

**RECEIVED  
CENTRAL FAX CENTER****MARTIN & FERRARO, LLP**  
1557 Lake O'Pines Street, NE  
Hartville, Ohio 44632**MAY 12 2005**Telephone  
(330) 877-0700Facsimile  
(330) 877-2030**FACSIMILE TRANSMITTAL**

<b>TO:</b>	<b>FROM:</b>
<b>Name:</b> Mail Stop AMENDMENT Group Art Unit 3764/Examiner Michael Brown	<b>Name:</b> Thomas H. Martin, Esq.
<b>Firm:</b> U.S. Patent & Trademark Office	<b>Phone No.:</b> 330-877-2277
<b>Fax No.:</b> 703-872-9306	<b>No. of Pages (including this):</b> 6
<b>Subject:</b> U.S. Patent Application No. 09/497,590 Gary K. Michelson, M.D. Filed: June 6, 2000 APPARATUS INCLUDING A GUARD MEMBER HAVING A PASSAGE WITH A NON- CIRCULAR CROSS SECTION FOR PROVIDING PROTECTED ACCESS TO THE SPINE (as amended) Attorney Docket No. 101.0044-03000 Customer No. 22882 Confirmation No.: 7688	<b>Date:</b> May 12, 2005  <b>Confirmation Copy to Follow:</b> NO

**Message:****CERTIFICATE OF TRANSMISSION UNDER 37 CFR 1.8**

I hereby certify that the attached Transmittal Form (in duplicate; \$120.00 total amount to cover the one-month extension fee is to be charged to Deposit Account No. 50-1066) and Reply to Office Action are being facsimile transmitted to the U.S. Patent and Trademark Office on May 12, 2005.

  
Sandra L. Blackmon

If there is a problem with this transmission please call Sandy Blackmon at 330-377-1202 or the sender at the number above.

The information contained in this facsimile message is privileged and confidential information intended only for the use of the addressee listed above. If you are not the intended recipient or the employee or agent responsible to deliver this message to the intended recipient, please do not use this transmission in any way, but contact the sender by telephone.

FORM PTO-1083

Attorney Docket No.: 101.0044-03000  
Customer No. 22882

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:

Gary Karlin Michelson, M.D.

Serial No: 09/497,590

Filed: June 6, 2000

For: APPARATUS INCLUDING A GUARD  
MEMBER HAVING A PASSAGE  
WITH A NON-CIRCULAR CROSS  
SECTION FOR PROVIDING  
PROTECTED ACCESS TO THE  
SPINE (as amended)

Confirmation No.: 7688

Group Art Unit: 3764

Examiner: Michael Brown

**RECEIVED**  
**CENTRAL FAX CENTER**  
**MAY 12 2005**Mail Stop AMENDMENT  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

Dear Sir:

Transmitted herewith is a Reply to the Office Action dated January 12, 2005 in the above-identified application.

- ☐ No additional fee is required.
- ☒ Applicant hereby requests a one-month extension of time to respond to the above office action.
- ☒ The total amount of \$120.00 to cover the one-month extension of time fee is to be charged to Deposit Account No. 50-1066.
- ☒ The Commissioner is hereby authorized to charge any deficiencies of fees associated with this communication or credit any overpayment to Deposit Account No. 50-1066. **A copy of this sheet is enclosed.**
- ☒ Any filing fees under 37 C.F.R. § 1.16 for the presentation of extra claims
- ☒ Any patent application processing fees under 37 C.F.R. § 1.17

Respectfully submitted,  
MARTIN & FERRARO, LLP

05/13/2005 EABUBAK1 00000051 501066 09497590

01 FC:1251 120.00 DA

Date: May 12, 2005

By: 

Thomas H. Martin

Registration No. 34,383

1557 Lake O'Pines Street, NE  
Hartville, Ohio 44632  
Telephone: 330-877-0700  
Facsimile: 330-877-2030

Transmittal of Reply to Office Action doc

PATENT  
Attorney Docket No. 101.0044-03000  
Customer No. 22882

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: )  
Gary K. Michelson, M.D. )  
Serial No.: 09/497,590 ) Confirmation No.: 7688  
Filed: June 6, 2000 )  
For: APPARATUS INCLUDING A )  
GUARD MEMBER HAVING A ) Group Art Unit: 3764  
PASSAGE WITH A NON- ) Examiner: Michael Brown  
CIRCULAR CROSS SECTION )  
FOR PROVIDING PROTECTED )  
ACCESS TO THE SPINE (as )  
amended) )

RECEIVED  
CENTRAL FAX CENTER  
MAY 12 2005

Mail Stop AMENDMENT  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

**REPLY TO OFFICE ACTION**

In reply to the Office Action dated January 12, 2005, the period for reply having been extended for one month by a request for extension and fee payment filed concurrently herewith, the following remarks are submitted:

In the Office Action, the Examiner objected to claims 130 and 169 as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

The Examiner rejected claims 105-115, 121-125, 127-129, 131, 132, 134-141, 143, 144, 146, 147, 149-165, 167, 168, 170, 171, 173-180, 182, 183, 185, and 186 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,878,915 to Brantigan ("Brantigan"). Applicant respectfully traverses the Examiner's rejection. Independent claim 105 recites a guard having a passage with a width and a height, "the width of said passage being greater than the height of said passage along at least a

Reply to Office Action 5-12-05.doc

Application No. 09/991,579  
Reply to Office Action dated May 12, 2005  
Reply to Office Action of January 12, 2005

portion of said passage." Independent claim 149 recites a guard having a passage, "said passage having a non-circular cross section along at least a portion of the mid-longitudinal axis."

Brantigan teaches a sleeve 22 configured for use with a rotary drill. (Brantigan, col. 5, lines 41-46; Fig. 4). Brantigan does not teach or suggest a guard with a passage having a width that is greater than its height; or a guard with a passage having a non-circular cross section as recited in independent claims 105 and 149, respectively.

Moreover, independent claims 105 and 149 recite an extension with a portion "having an upper surface adapted to contact one of the adjacent vertebral bodies and a lower surface adapted to contact the other of the adjacent vertebral bodies, said portion of said extension having a height between said upper and lower surfaces and a length sufficient to properly align and distance apart the adjacent vertebral bodies." The Examiner contends that Brantigan discloses "extension portions (the portions of 22 that extends outward near 23 but don't including 23)." (Office Action, page 2, paragraph 4). The portion of sleeve 22 that the Examiner refers to does not have a height as claimed in independent claims 105 and 149. (See, e.g., Brantigan, Fig. 4). Accordingly, Applicant respectfully submits that the rejection of claims 105-115, 121-125, 127-129, 131, 132, 134-141, 143, 144, 146, 147, 149-165, 167, 168, 170, 171, 173-180, 182, 183, 185, and 186 under 35 U.S.C. § 102(b) cannot be sustained.

The Examiner rejected claims 126, 133, 142, 145, 148, 166, 172, 181, 184, and 187 under 35 U.S.C. § 103(a) as being unpatentable over Brantigan in view of U.S. Patent No. 4,537,185 to Stednitz. Applicant submits that the rejections over claims 126, 133, 142, 145, 148, 166, 172, 181, 184, and 187 are rendered moot at least because they depend from an allowable independent claim, or claims dependent therefrom.

Applicant submits that independent claims 105 and 149 are patentable and that dependent claims 106-115, 121-48, and 150-187 dependent from independent claims 105 or 149, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

In view of the foregoing remarks, it is respectfully submitted that the claims, as amended, are patentable. Therefore, it is requested that the Examiner reconsider the

Application No. 09/991,579  
Reply to Office Action dated May 12, 2005  
Reply to Office Action of January 12, 2006

outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-1066.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: May 12, 2005

By:   
Thomas H. Marin  
Registration No. 34,383

1557 Lake O'Pines Street, NE  
Hartville, Ohio 44632  
Telephone: (330) 877-0700  
Facsimile: (330) 877-2030